



## Fox Rothschild Podcast

### The Presumption of Innocence

#### Episode 75: Who's in Charge? Navigating Uncertainty in New Jersey's U.S. Attorney's Office

*Featuring Matt Adams of Fox Rothschild and James Pearce*

**Matt:** Welcome back to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild.

As the age-old saying goes, to the victor, go the spoils. It generally means that the winner --and in this instance, a winner of an election-- gets all the rewards, benefits and resources from it. In the U.S., that saying became famous in the political arena in the 1830s. It was linked to then-Senator William Marcy describing how winning a political election would give all the government jobs to supporters as rewards. And that has historically been the way that nominations for the chief federal law enforcement officer in all of the U.S. Attorney's Offices throughout the country have been awarded. It has been generally the prerogative of the executive branch to appoint people to those positions who were loyal to them in the political process.

Our guest today is James Pearce, a Senior Counsel at the Washington Litigation Group. He's a former federal prosecutor. He's tried criminal cases throughout the United States, argued more than 40 federal appeals, managed a team of appellate attorneys assisting prosecutors related to the attack on the Capitol on January 6, 2021, and has litigated the first-ever federal prosecutions of a former president as an Assistant Special Counsel to then-Special Counsel Jack Smith. But today we are talking about some groundbreaking litigation coming out of the Third Circuit Court of Appeals involving the now-former U.S. Attorney for the District of New Jersey.

James, welcome to "The Presumption of Innocence." And I am coming down the path today to take a deep dive into the legal issues-- not the political issues --associated with the appointment of Alina Habba as U.S. Attorney in the District of New Jersey. Welcome to "The Presumption of Innocence," James.

**James:** Thanks Matt. It's great to be here.

**Matt:** So we all know that Alina Habba was a lawyer. She previously served as the president's personal attorney in various high-profile civil cases. And be that as it may, in March of 2025, she was appointed as the acting U.S. Attorney for the District of New Jersey, a district near and dear to me, a district where I predominantly practice. And her appointment immediately came under fire. But what about the appointment itself? Having this notion of Acting U.S. Attorney for the District of New Jersey had a expiration date on it under the established law.



**James:** Yeah. So I mean, for better or worse, this is actually a pretty technical area. I mean, you framed, I think, effectively, the bigger picture. Which is in all of the over 90 judicial districts, there are, there's a top prosecutor, a U.S. Attorney. And that person, by law, is a presidential appointee, who then needs to go through Senate confirmation. And when that process completes, that person serves as the U.S. Attorney and has the power and a discretion that a U.S. Attorney has.

Congress is also provided in instances where, you know, not infrequently after a presidential transition, it takes a little bit of time to get somebody confirmed, right? So there's some ways to fill that position on a temporary basis. And there are a couple of different statutory provisions. So the default is, again, presidential nomination followed by Senate confirmation. But there are two different, sort of temporary U.S. Attorney vacancies provisions. Or more specifically, one is for U.S. Attorneys and then one is generally available for executive branch vacancies.

And so Habba was first appointed under the U.S. Attorney position. And as you said, it has an expiration date. That statute, 28 USC 546, allows the Attorney General to appoint someone for, essentially, up to 120 days or, until a permanent, so to speak, U.S. Attorney is confirmed.

And so in Habba's case, she came in, as you said, in March of this year, of 2025. Somewhat relevant to the story: There had been another individual guy by the name of John Giordano who had been first appointed under this provision and served about three weeks.

**Matt:** For a cup of coffee.

**James:** Yeah, more or less, right? And then, uh, uh, and then he makes way, and Habba comes in. There's, you know, I don't think we need to get into the details, but you know, she comes in late March. And then, you know, as we are approaching that 120-day, when-you-turn-into-a-pumpkin deadline, the District Court-- and I guess I should back up and say that same statute that gives the Attorney General this 120-day period also provides later on that if that period lapses, the District Court then has the discretion to appoint someone to then fill the position, essentially indefinitely, until a permanent person comes on the scene.

In practice, District Courts sometimes choose the very same person the Attorney General did. But they don't have to, and there are plenty of times when they don't.

**Matt:** And the policy rationale behind this expiration date, the 120 days, is what? If you can't get somebody confirmed by the Senate in 120 days, then perhaps you should look for another U.S. attorney? Is that it?

**James:** I mean, I think there's a larger policy rationale, which is that U.S. Attorneys-- again, as I think your opening appropriately framed-- are folks with great power and great discretion. And so Congress has seen fit to make sure that they go through a vetting process, which is not only the President of the executive branch making the pick, but also the Senate, you know, providing its advice and consent, or not, right? And so I think it is, yeah, you know, administration, you've got 120 days to get your person through the Senate. And if not, you know, we're not gonna let you



indefinitely just consolidate all of the appointment power in the Executive Branch. We're gonna kick it over, to the court.

Again, the court could end up picking the same person. And look, as soon as you, executive branch, gets your person through the Senate, that then, you know, confirmed individual would displace the judicial nominee at that point.

**Matt:** So up against this expiration date, Ms. Habba, didn't go anywhere after that expiration date. On the 121st day, what happened?

**James:** Yeah. And I should say-- which, which I don't think we want to get detoured into-- there's a lot of fighting about the specific dates and when that day, you know, landed and the relevance of our friend John Giordano's three weeks.

But, the bottom line is after the District Court issued an order that, it sort of acknowledged, look, we don't exactly know when that 120-day period ends. But when it does, we hereby appoint an individual named Desiree Grace, who at the time was the top deputy, the First Assistant U.S. Attorney, to take over that position.

**Matt:** By statutory authority conferred upon the judiciary.

**James:** Correct. Yep. Under that same statute, the section 546, D as in Delta, for those keeping score at home. The District Court had the authority to do that. And so it said, you know, sort of acting under that authority, we are going to have Desiree Grace fill that role. The administration sort of responded, I think, quite vehemently to that and basically said, well, first of all, you got your dates wrong. Habba is still serving and has additional time. And by the way, we're going to remove Ms. Grace from the role of, you know, to the extent she's actually placed in that role, we're removing her. And then the government went one further and actually fired her. And you know, I don't know her, I have not spoken with her, but my sense is she is, she was very much collateral damage in a larger fight about the power of the executive branch to fill the top prosecutor role in New Jersey.

So, you know, that happens. And then Attorney General Pam Bondi issues an order that purports to appoint Habba as Bondi's, or the Attorney General's Special Counsel, or Special Assistant, under a different statute, and then appoints her as the First Assistant-- by the way, the role that Desiree Grace had filled, before she was, you know, elevated by the District Court and then quickly exited from the scene. So Habba is appointed as a Special Assistant to be the First Assistant. And then if that weren't complicated enough, the next step was to say, by operation of the Federal Vacancies Reform Act, Habba then becomes the Acting U.S. Attorney.

So, technically she had been the Interim U.S. Attorney under Section 546. Now in the government's view, she was the Acting U.S. Attorney, under-- we haven't really talked about it-- but the Federal Vacancies Reform Act, this other statute that allows for the filling of Executive Branch vacancies.

**Matt:** Have we ever seen such a circuitous path to this top law enforcement job in a particular federal district before? Is there any historical basis for something so convoluted?



**James:** Certainly to my knowledge, no historical basis. I will say that what happened with Ms. Habba became a bit of the playbook in other parts of the country. We've seen the government adopt a similar approach in Nevada, in the Central District of California, i.e. Los Angeles, to some extent in New Mexico, in the Northern District of New York.

So, no is the answer to your question as to historical kinda support for this, you know, roundabout or circumventory approach. But it has become a tool in the executive branch's arsenal in trying to fill U.S. Attorney positions.

**Matt:** So here we are. We have this appointment that lapses. We have the judiciary taking steps under its statutory authority to fill that vacancy. We have the firing of the person that filled the vacancy under the judicial authority. And now we have sort of this uncertainty that emerges about who has the job. And why is that so important? Because it's not just a figurehead, right? I mean, this job has the ultimate authority to sign the indictments that that office issues, right?

**James:** Yeah, and I would go more than that. So, Robert Jackson, a Supreme Court Justice, also Attorney General in his time, a kind of a man-of-all-seasons, gave a speech that is famous to least for former Justice Department and hopefully current Justice Department attorneys like myself in 1940 where he says something like-- and I don't have the precise language in front of me, but-- a U.S. Attorney has more control over the life, liberty and reputation than anyone else in the country, right? Far from a figurehead, but somebody who sets prosecutorial policies. You know, signs, indictments, and plays often a very significant role in trying to figure out, kind of, the types of cases-- hopefully not the type of people, that's one of the things Jackson said-- but the types of cases that an office should be pursuing, including through the significant investigatory powers that the grand jury has.

**Matt:** Okay, so we're in this state of flux. How do you get involved? Because you were personally involved in the case. And, I don't want to tell your story. I know it, but, so, tell our audience how you become personally, you and your law firm, personally involved in trying to get resolution to this state of flux in the District of New Jersey.

**James:** Sure. Yeah. So I mean, as is probably no surprise to anybody either listening or having followed this, challenges to the validity of Ms. Habba's appointment quickly followed on this, a historical and legally questionable efforts to put her in as the acting, after, you know, the 120-day period lapsed.

And so, individual criminal defendants challenged that and the Association of Criminal Defense Lawyers of New Jersey-- the largest criminal defense organization representing criminal defense attorneys who practice in the District of New Jersey, state courts in New Jersey-- sought to participate in the litigation as an amicus.

And I think, it's also important to mention that, although of course this focused on New Jersey, ultimately, that litigation got kicked out to the Chief Judge of the Middle District of Pennsylvania. I think the concern being that, listen, the U.S. Attorney and the U.S. Attorney's Office is a repeat player, is in front of all these courts. And by the way, as we've mentioned a couple of times, the courts have a role in potentially appointing who that person is, at least on a temporary basis. And so the, I



suppose that's a bit of a long-winded way of saying, I and my firm represented the Association of Criminal Defense Lawyers of New Jersey, in these challenges to Ms. Habba's appointment in front of first the District Court in the Middle District of Pennsylvania, but on, you know, sitting on behalf of the court in New Jersey.

**Matt:** Yeah. And, in full and fair disclosure, I am a past president of the ACDL NJ, an organization that is near and dear to my heart and is a huge player in arguments such as this. We frequently get involved as amicus, in matters that directly impact the defense bar and our clients.

What were the arguments presented at the District Court level challenging this state of flux that the U.S. Attorney's Office was in. I mean, it was specific to certain cases that were then pending, right?

**James:** That's right.

**Matt:** But it really took on a broader policy implication.

**James:** Yeah, that's absolutely right. And there were two cases essentially that were consolidated. One involving defendants who had been indicted under a prior U.S. Attorney. In fact, as I recall, the last Senate-confirmed U.S. Attorney and then--

**Matt:** Phil Sellinger.

**James:** Phil Sellinger, that's right, yep.

And then, a second case, that involved an indictment that came down actually in, on July 7th of this year, so, during Habba's purported tenure. And so the questions that were teed up in the District Court were essentially both the validity of the indictment-- you know, and again, the indictments were obtained at different points in time, so different questions posed there. And then, to get a little bit ahead of the story, although not kind of going down the road too far, the future ability of Ms. Habba to serve in her role. In other words, whether her appointment was valid so that she could prospectively hold the role of U.S. Attorney, Acting U.S. Attorney, as it were.

**Matt:** How did the District Court rule on those issues?

**James:** The District Court, moving quite quickly and I should say held an extensive hearing. It might have been three hours long. I was there, and presented argument on behalf of, ACDL in scenic Williamsport, Pennsylvania. At the same time, I will add, that the Little League World Series was ongoing, so, quite a place to be that time of year. The District Court ruled in favor of the defendants and found-- well, I should say in part. The District Court did not, in either of the cases, agree that any indictment should be dismissed, either for the indictment secured before Habba's purported tenure, or the one secured in July of this year. But did decide that she was not validly holding the position.

And that ruling basically boiled down to a couple of conclusions. One was that under the Federal Vacancies Reform Act, which again is the statute, we didn't talk too much about it yet, but is the one that is sort of generally available for executive branch vacancies. It has a default rule that says, when an executive branch vacancy arises, the First Assistant is the one that fills the vacancy. And what the



government had tried to say was, well, look, the position was vacant. Then the Attorney General appointed Habba as First Assistant, so, you know, by that fact, ipso facto, she, Habba, becomes the U.S. Attorney. The District Court rejected that, and said, no, the way this works, the way Congress designed it and what the statute says, is you've gotta be the First Assistant at the time the vacancy arose. Which Ms. Habba was not. And so she was, out on those grounds.

The defendants and ACDL had raised a separate argument that the District Court didn't get to-- that the Third Circuit did as we can maybe discuss in a moment-- which is, the Federal Vacancies Reform Act has a second provision that basically says if you've been nominated, and certain other steps are met, that's also a bar from filling the position on an acting basis. And so the District Court didn't reach that, but that was another live argument against Habba.

And then, secondly-- and I recognize this is sort of down and a bit technical, but it's certainly important for the way the litigation proceeds --is that the government, in the course of litigating it, had advanced a different argument, not one that was sort of part of the Attorney General's initial order appointing Habba in late July, which said like, look, you know what, even if Ms. Habba is not validly serving as the Acting U.S. Attorney under the Federal Vacancies Reform Act, she's been delegated all the powers by the Attorney General herself. And so she is functioning, what we sort of call this delegation theory. As though, the Attorney General has just given her the power to go and handle all matters that the U.S. Attorney would normally handle. Maybe she's not called the U.S. Attorney, maybe we call her the Special Assistant or Special Counsel, but she functionally serves as the U.S. Attorney.

**Matt:** It's sort of like we've seen with the appointment of certain Special Counsels under the Special Counsel Statute, right?

**James:** Yeah. I mean, so, I guess a little bit. Like, sort of like that, right? I mean, so that is the particular basis relied on is the same basis for the Special Counsel Statutes. The difference is, there's not really other statutes for Special Counsels. There are a couple other, and by way of disclosure, I should say when I worked for the Special Counsel, I argued this issue on behalf of the Special Counsel down in the Southern District of Florida. So have some involvement on the Special Counsel side of it.

With the U.S. Attorney, as we were talking about, I mean, this is a position that goes back essentially to the founding and has sort of a clearly defined sort of separate statutory regime, and these separate ways of trying to fill vacancies.

**Matt:** So the government loses at the trial court, in the Middle District of Pennsylvania. You catch a couple of the Little League World Series games while you're out there. And then the government takes appeal to the Third Circuit. What happens there?

**James:** What happens is a pretty tough, tough day for the government there.

It was actually pretty striking. So as you mentioned, government lost, so they appeal. So they're up first at the podium. And, right into the beginning of the argument, one of the judges picks up the



brief, the government's brief and points to Ms. Habba's name-- Ms. Habba's there in the courtroom. Not the interaction, Ms. Habba is not arguing it, so it's not, the question is not to her-- but sort of points to her name that says, and I don't remember precisely, but it's, you know, Special Assistant Acting U.S. Attorney, these various titles. And the judge is sort of like, what is this? I've, you know, we've got a U.S. Attorney, we've got an Acting, like, I've never seen this. And that really sets the tenor. And the long and short of it is you know, that it's a pretty tough bench, one might say hostile bench, for the government, ultimately resulting, right the beginning of this month in a unanimous opinion from the three judges-- two Republican appointees, one Democratic appointee-- affirming the District Court across the board that Ms. Habba is not validly serving as the Acting U.S. Attorney, was not validly delegated all the authority from the Attorney General.

**Matt:** And rather than take the issue to the United States Supreme Court, she resigned. Or did she?

**James:** It's a great question and it's one that I'm not sure I know precisely the best answer to it. I mean, yes, of course, she did, a week or so after, announce that she was stepping down from her role at the New Jersey U.S. Attorney's Office, and stepping instead into some role as an assistant to the attorney general overseeing I can't remember what, but something. But at the same time, the government has not said that-- and this came through in both Ms. Habba and the Attorney General's sort of public statements-- the government did not say, yep, and we're sort of closing up shop and we fold. They said we're seeking further review. And the government filed a motion for extension of time to seek en banc review at the Third Circuit. So, you know, there're gonna be some gnarly mootness questions, because it's awfully hard to see how you can both resign and continue to challenge.

But I suspect what the government intends to argue, and I think they've essentially said as much, is that they think the decision's wrong. And if it is overturned, either in the en banc Third Circuit or potentially the Supreme Court, then Habba will sort of spring back into her position. Maybe will require a new appointment, but... that decision to leave the office is confusing, though I suspect you know, we haven't talked about this, but things had ground to a halt in many ways in the District of New Jersey.

**Matt:** Oh, I know.

**James:** In terms of litigations.

**Matt:** Oh, I know.

**James:** As probably you and many criminal defense attorneys listening to this well know. And so, you know, there's a little bit of sanity in saying like, well, look, we've gotta continue to operate the office. So I think the government is a little bit trying to have its cake and eat it too, which has allowed kind of to try to remove the cloud of uncertainty while at the same time trying to preserve its rights to further appeal the Third Circuit's decision.

**Matt:** So for the laypeople listening, en banc essentially means that the entirety of the Third Circuit, not just the three-judge panel that heard the appeal initially, will have a shot-- if granted --at



deciding this issue. And then after that, if it's either denied or it's heard en banc, that's when it would be ripe for a motion for certiorari to the United States Supreme Court, correct?

**James:** Yeah, that's right. I mean, you know, it's interesting that the government did ask for this additional time to try to get en banc, or sort of review by the whole court, because you don't have to do that to get Supreme Court review. You can try to get cert and go right up to the Supreme Court. Or as we've seen more and more often these days, you know, try to get on the Supreme Court's-- people have different terms for it-- Emergency Docket, Shadow, Docket, whatever.

But, yes. I mean, basically there are these two steps. And it does seem by seeking more time that the government is seriously considering trying to ask the full en banc Third Circuit to take another look at this.

**Matt:** Talk to me a little bit about this destabilizing impact that this whole situation-- for the better part of the last six months --has created in the District of New Jersey. Because, you know, I practice here and I see it. I see it in my own cases. They're not moving. I see it in cases that were once investigative priorities that have seemingly stalled. What is that broader implication? I mean, what, what is the broader implication that we have nobody at the top of what was once a very, very active, engaged, professionally run office.

**James:** Yeah. Well, I mean, in some ways I feel like I should try to turn the tables and have you talk about it as somebody who's, unlike me, representing folks every day and going in front of judges. But I mean, you've sort of hit on it, which is just, I think, immense uncertainty about the authority of the office. And I should say, the District Court decision not only disqualified Habba, but basically said, and any Assistant United States Attorneys, AUSAs, operating under Habba's supervision and authority are likewise not authorized to practice. And what precisely does that mean? As I understand it, some judges, or at least one has said, I want a kind of continuing update on what steps you're taking and whether or not they've been authorized or were they, you know. And for things that have happened historically, do you have to go back and try to pull apart? Was Habba involved, was Ms. Habba involved in this decision or that? And so, yeah, I think there's tremendous uncertainty. And I think that puts folks in, extremely difficult circumstances. Some people may want their proceedings to move forward. Some people may be happy to have things slow down. But, I think that they're just, you know, challenging judgment calls, strategic calls to be made. All against the background of ongoing uncertainty.

**Matt:** And this, mootness argument that will now factor into the motion for rehearing en banc at the Third Circuit, effectively sounds in common parlance as just simply, well, it's not an issue anymore because she stepped aside. But at the same token, nobody else has been named U.S. Attorney in the District of New Jersey as far as we can say at December 11 at 4:40 p.m. right?

**James:** Yeah. Not to my knowledge, no. Instead, it looks like what the government has done is appoint what some people are starting to refer to as the triumvirate, right, like some sort --

**Matt:** The triumvirate. I had a conversation with an AUSA last night about this very thing. I said, who the heck is in charge?



**James:** Yeah. Yeah. And so they've divvied up, the government's divvied up responsibilities between three AUSAs to kind of handle criminal matters and appellate and special matters and administrative. And, so, how is that gonna work? Is that itself lawful? There's language in the Third Circuit opinion that I suspect the government will argue blesses that. And I will say, you know, it's not, it certainly happened in the course of the Justice Department's existence that, like certain matters have been carved out of a U.S. Attorney. But usually that's something like, you know, the U.S. Attorney's Office is recused. Because I mean, look, I'll say this, I was a public corruption investigator for a couple of years. And if there are allegations that there's corruption and that sort of somehow touches folks in the office, you don't get the office to investigate that, right? So you bring in someone else to run the investigation. But that's, of course not what has gotten us here. It is instead these efforts that we've been talking about in trying to circumvent what are available ways to actually fill a vacancy.

So, you know, a lot of that uncertainty remains not only with mootness, but as you said, with the way the office is running now and the legality of this triumvirate system.

**Matt:** Is there a lingering argument that the actions of this triumvirate are in fact illegal?

**James:** I mean, I think there is. Again, there's language in the Third Circuit, opinion that I think the government will rely on. But look, we are still in a world where the government has sought to evade - at least that's the way our litigation in litigating it, we characterized it-- the existing statutes.

In my view, the president today could use other parts of the Federal Vacancies Reform Act to appoint somebody who's already been Senate confirmed. Presidentially appointed, Senate confirmed. Somebody who is of adequate seniority and tenure in the office as an Acting U.S. Attorney. Or the District Court could still appoint someone under the statute we began talking about 546, right? So, why those things don't happen is I suppose a bit of a mystery to me.

**Matt:** Could the president go and use the appointments authority under Article Two to simply appoint a new Acting U.S. Attorney and start another 120-day clock?

**James:** So, to be clear, that's vested in the Attorney General. But, I think the answer to that is no. And the District Court here thought the answer to that question was no. That wasn't an issue up on appeal before the Third Circuit. And for whatever it's worth, the only other court that I'm aware of that has squarely dealt with this question is the judge in the Eastern District of Virginia prosecutions involving James Comey and Letitia James.

Like in the New Jersey example, it was actually a judge sitting in South Carolina to kind of deal with potential conflicts, concerns. And that judge, Judge Curry in South Carolina, also would say the answer to that is no.

**Matt:** We're talking with James Pearce of the Washington Litigation Group. He represented the Association of Criminal Defense Lawyers of New Jersey in connection with the ongoing saga associated with the appointment of Alina Habba as the U.S. Attorney for the District of New Jersey. James, in our waning moments together here today, talk to me about sort of the broader, more national implications of this.



You alluded at the outset that there are now similar litigations popping in other districts. You just mentioned the situation in Virginia with the indictments of the New York Attorney General and the former FBI director. Talk to us about those issues and whether it's all cut from the same core legal issue or they're slightly different.

**James:** Yeah. I think thematically there is a core similarity, which I think is a theme of the discussion that we've had thus far. Which is really that Congress has long recognized, in fact, from the very beginning of our country, the power and discretion and the importance that a U.S. Attorney has, and so has put in place these statutes to ensure that it is filled in a way that has not only presidential involvement, but also Senate involvement. Or if not Senate involvement is very sort of narrowly time bound. And, what we have seen throughout the country is the government adopting a different approach, an approach that tries to get around those rules, right? And so the legal issues are slightly different. I mean the example that we just talked about in the Eastern District of Virginia, involving Lindsey Halligan was more of an issue under, section 546, the U.S. Attorney provision. Whereas in the other areas like Nevada and Los Angeles, the issues are closer to what we saw in the Habba litigation involving the Federal Vacancies Reform Act and the delegation theory.

But you know, when you back away from the differences, the sort of the nuance in the legal weeds, I really do think it reflects that broader theme of circumvention or trying to do an end-around of statutes that are put in place for the clear reason of ensuring Senate involvement and nonconsolidation in the executive branch of a powerful U.S. Attorney position.

**Matt:** Well, James, what you're handling is the definition of impact litigation. I believe this to be at the core of our responsibility as attorneys operating in this system to preserve the rule of law in our country. I commend you for it and we'll all be watching as this case further plays out at the Third Circuit and potentially beyond.

That's all the time we have for this episode of "The Presumption of Innocence." I'm your host, Matt Adams. Until next time, we'll see you then. Take care.